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No. 92-6281

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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ROBERT P. HAGEN,
PETITIONER,

vs.

STATE OF UTAH,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF UTAH

BRIEF OF AMICUS CURIAE UTE INDIAN TRIBE

IN OPPOSITION TO THE WRIT OF CERTIORARI

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Nov. 18, 1992

QUESTION PRESENTED*

1. Whether the State of Utah is precluded, by virtue of its voluntary participation as a defendant in Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981); aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), from relitigating the issue of whether Congress intended to disestablish the Uintah Valley Reservation, Utah.

LIST OF PARTIES

The petitioner in this action is Robert P. Hagen, an enrolled member of the Little Shell Band of Chippewa Indians, which is not an Indian tribe that has been recognized by the United States. The respondent is the State of Utah. The Ute Indian Tribe appears before this Court, for the first time in these proceedings, as amicus curiae.

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* The Ute Indian Tribe opposes the petition for writ of certiorari in this case and is filing this amicus brief pursuant to Sup. Ct. R. 37.1 in order to bring to the Court's attention relevant matters not disclosed by the petitioner or respondent. Because the petitioner filed in forma pauperis, the Tribe is also filing its brief in accordance with Sup. Ct. R. 39.5.

INTEREST OF AMICUS UTE INDIAN TRIBE**

Through its governing body, the Ute Indian Tribe*** exercises civil and criminal jurisdiction within the confines of the Uintah and Ouray Reservation in northeastern Utah. After more than 10 years of litigation, in which all parties with an interest in the geographical scope of the Tribe's jurisdiction, including the State of Utah, were fully represented, the boundaries of the Reservation were confirmed by the United States Court of Appeals for the Tenth Circuit in 1985. See Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). The decision of the Tenth Circuit confirmed that the Tribe's jurisdiction extends to some 4.4 million acres. The current controversy, in which the Tribe was not invited to, and, heretofore, did not, participate, threatens to

** Letters from counsel for the petitioner and respondent consenting to the Tribe's participation in this proceeding as amicus curiae are included in Appendix A, as required by Sup. Ct. Rule 37.2.

*** The Ute Indian Tribe is organized as a constitutional government under the provisions of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986.

diminish by more than three million acres the jurisdictional territory of the Tribe and the area in which its citizens (and, in certain circumstances, enrolled members of other federally recognized Indian tribes) are governed by tribal and federal, as opposed to state, law.

As a governmental entity with sovereign authority over its territory, there is no issue of greater importance to the Tribe than the extent of its territorial jurisdiction. The Tribe has a fundamental interest in protecting the integrity of its territorial jurisdiction, especially where the geographic scope of that jurisdiction has been established definitively in a case in which this Court has already denied a writ of certiorari. See Utah v. Ute Indian Tribe, 479 U.S. 994 (1986). Of similar importance, the rights, interests and expectations of Reservation residents have been established in reliance on the Tenth Circuit's decision for more than seven years. The Tribe has a vital concern that those rights, interests and expectations not be disrupted. In addition, as the prevailing party in Ute Indian Tribe v. Utah, supra, the Tribe has a significant interest in ensuring that the judgment of the Tenth Circuit, obtained after

10 years of costly litigation, is protected from collateral attack, particularly in an action in which the interests and views of neither the Tribe nor its members were represented.

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STATEMENT OF THE CASE

In 1975, the Ute Indian Tribe, under authority of its constitution,[1] promulgated the Ute Law and Order Code. Under the Code, and as authorized by federal law, the tribal court exercises civil and criminal jurisdiction throughout the original boundaries of the Uintah and Ouray Reservation[2].

Publication of the Code raised immediate protest from the State of Utah and from the political subdivisions located within the original boundaries of the Reservation. See Ute Indian Tribe v. Utah, 521 F.Supp. 1072, 1077 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Some officials went so far as to encourage their

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[1] Article VI, § 1(k) of the Constitution of the Ute Indian Tribe authorizes the Tribal Business Committee to establish a "Reservation Indian court" for "the maintenance of law and order and the administration of justice" within the Reservation.

[2] The present Uintah and Ouray Reservation is comprised of two separate but contiguous reservations established for the use and occupancy of the Ute Indians. The Uintah Valley Reservation was established by Executive Order of October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63. The Uncompahgre Reservation was established by Executive Order of January 5, 1882. Only the boundary of the Uintah Valley Reservation is at issue in this action.

constituents to openly resist enforcement of the Tribe's Code. 521 F.Supp. at 1078.

Ute Indian Tribe v. Utah

In order to establish, once and for all, the exterior boundaries of the Reservation, the Tribe filed an action for declaratory relief in the Federal District Court for the District of Utah in 1975. Full participants to the proceedings included the Tribe as plaintiff; State of Utah, as a defendant-intervenor; the Counties of Duchesne and Uintah and the Cities of Duchesne and Roosevelt as defendants; and the United States as amicus curiae.[3]

The issues litigated in Ute Indian Tribe were (1) whether, by various statutes, Congress intended to disestablish portions of the Uintah Valley and Uncompahgre Reservations, and (2) the force and effect of the Tribe's Code within the boundaries of the Reservation. 521 F.Supp. at 1075. The district court held that the Uncompahgre Reservation had been disestablished, but that the Uintah Valley

[3] The United States supported the Tribe's position that the Uintah Valley Reservation had not been disestablished. The Tribe is not aware of any change in fact or law that would indicate the United States has since altered its position on this issue.

Reservation remained largely intact. The Tribe and State filed cross appeals to the United States Court of Appeals for the Tenth Circuit.

On appeal, a two-judge majority of a panel of the Tenth Circuit initially ruled that substantial portions of the Uintah Valley Reservation had been disestablished. See Ute Indian Tribe v. Utah, 716 F.2d 1298 (10th Cir. 1983), rev'd, 773 F.2d 1087 (10th Cir. 1985) (en banc). However, on rehearing in light of this Court's intervening decision in Solem v. Bartlett, 465 U.S. 473 (1984), a majority of the Tenth Circuit, sitting en banc, ruled that the Uintah Valley Reservation had not been disestablished, but had been diminished with respect to two parcels of land not at issue in this case. See 773 F.2d 1087 (10th Cir. 1985) (en banc). The defendants, including the State of Utah, sought review by this Court, but the writ of certiorari was denied. See Utah v. Ute Indian Tribe, 479 U.S. 994 (1986). Unhappy with this Court's denial of review of the Tenth Circuit's decision, the State has continued to raise the boundary issue at every opportunity.

State v. Hagen

The present case was initiated in 1988, when

the State of Utah filed an information against Robert P. Hagen, charging him with distribution of a controlled substance for value, to wit: marijuana, a third-degree felony. The alleged crime took place in Myton, Utah, which is located within the exterior boundaries of the Reservation, as those boundaries had been confirmed by the Tenth Circuit in Ute Indian Tribe. The initial charges against the defendant were dismissed, without prejudice, when the State learned that the defendant was being prosecuted in federal district court for the same offense.

The federal action against Hagen was dismissed for lack of jurisdiction, after the court determined that Hagen was not an Indian for criminal jurisdiction purposes. The State then refiled the same charges against him.

Hagen entered a plea of guilty, but subsequently filed a motion to arrest judgment and withdraw his plea. Even though Hagen had earlier prevailed on his argument that the federal court lacked jurisdiction to prosecute him on the ground that he was not Indian, Hagen now argued that the State lacked jurisdiction over the offense on the grounds that he was Indian and the alleged crime

had been committed on the Reservation.

Following an evidentiary hearing, the trial court denied Hagen's motion to arrest judgment and withdraw his plea. Transcript of Hearing at 25-26, lines 25-04, State v. Hagen, [hereafter, "T.__, lines _"].[4] The court determined that Hagen was not an Indian for purposes of criminal jurisdiction because he was not a member of a federally recognized tribe.[5] T.25, lines 13-16. The court expressly declined to address the issue of whether the locus of the crime was within the Reservation.[6] T.25, lines 12-13. On appeal, the Utah Court of Appeals ruled that the trial court had applied the improper standard

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[4] Relevant portions of the transcript are included in Appendix I to the Petition for Writ of Certiorari, Hagen v. State of Utah, No. 92-6281 (filed October 15, 1992) [hereafter, "Pet. at ___"].

[5] Hagen is a member of the Little Shell Band of Chippewa Indians, which has not been recognized by the United States. See 51 Fed. Reg. 25,115 (1986).

[6] Indeed, the trial court judge acknowledged that "[i]f the question of Reservation status had to be addressed this court would have to withdraw," because the judge, who had represented Duchesne County in the Ute Indian Tribe litigation, had "spent a good part of ten years arguing that very question, and quite frankly [] already ha[d his] mind made up on that point." T. 25, lines 16-20.

and burden of proof by requiring Hagen to establish, by clear and convincing evidence, that he was Indian. State v. Hagen, 802 P.2d 745 (Utah App. 1990), rev'd on other grounds, No. 910017, slip op. (Utah July 17, 1992). For that reason alone, the Utah Court of Appeals reversed Hagen's conviction. Id. at 747.

The Utah Supreme Court declined to address Hagen's status as an Indian. Instead, on the basis of its decision in State v. Perank, No. 860243, slip op. (Utah July 17, 1992), discussed below, the court summarily ruled that the State had properly exercised jurisdiction over Robert Hagen, because the offense with which he was charged had been committed outside the boundaries of the Reservation.[7] See State v. Hagen, No. 910017,

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[7] Until it reached the Utah Supreme Court, the only issues litigated in the Hagen case were whether Hagen was Indian for criminal jurisdiction purposes, and whether the trial court had applied the proper standard and allocation of the burden of proof in determining that he was not Indian. In declining the State's suggestion that it defer ruling in the Hagen case pending the Utah Supreme Court's resolution of the boundary issue in Perank, the Utah Court of Appeals stated:

> [t]he Tenth Circuit's decision does not appear to hold
>
> (continued...)

slip op. Although it involved a question that had been litigated in Ute Indian Tribe, and affected the jurisdictional authority of the Tribe and the United States, the decision in the Hagen case was rendered without any participation by those two sovereigns.[8]

State v. Perank

Perank involved another criminal prosecution that arose in Myton, Utah, and concerned a defendant who belatedly claimed to be Indian. In that action, the State encouraged the Utah Supreme

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[7](...continued)

> open any role for the state courts in refining its holding in Ute Indian Tribe . . . [W]e are hard pressed to see how, given the Supremacy Clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision [on the Reservation-boundary issue] that would have any practical effect.

802 P.2d at 747. The State appealed this dicta to the Utah Supreme Court, raising the Reservation-boundary issue for the first time in the Hagen case.

[8] The petitioner suggests that the Tribe "had a full and fair opportunity" to litigate the Reservation-boundary issue in the State court proceedings. See Pet. at 7. While the Tribe, State and United States did have a full and fair opportunity to litigate the issue in federal court, the Tribe did not appear as a party or otherwise in the Hagen case. The Tribe did appear as amicus in the Perank case, but only on the issue of Perank's status as an Indian and only after the Utah Supreme Court had heard oral argument in that action. See State v. Perank, slip op. at 43 (Zimmerman, J., dissenting).

Court to conclude, contrary to the 1985 en banc decision of the Tenth Circuit, that the Uintah Valley Reservation had been disestablished so as to preclude federal and/or tribal jurisdiction over crimes committed by Indians on non-trust lands within the Reservation.

The case arose in 1983, when Clint Perank entered a guilty plea to a charge of third-degree burglary in Myton, Utah. At the time, Perank was not enrolled or eligible for enrollment in the Ute Indian Tribe, the only tribe with which he claimed any affiliation.

Perank's sentence on the burglary offense was commuted to probation. In 1986, at a revocation-of-probation hearing, Perank asserted for the first time that the State lacked jurisdiction to prosecute him for his probation violation or the underlying burglary offense, arguing that he was Indian and the crime had been committed within the boundaries of the Reservation.

The State introduced no evidence challenging Perank's assertion that he was Indian for jurisdictional purposes. Thus, the trial court had virtually no choice but to rule that Perank was an

Indian for criminal jurisdiction purposes. As the State was aware, only after making that ruling could the trial court go on to address the question of whether the Uintah Valley Reservation had been disestablished.

After hearing oral argument in Perank's appeal, the Utah Supreme Court invited the Tribe to file an amicus brief in the Perank case. The Tribe confined its arguments to a vigorous assertion that Perank was not a member of, and was not eligible for membership in, the Tribe, and therefore was not an Indian for purposes of criminal jurisdiction. Remarkably, the State filed an 8-page reply brief arguing, contrary to the very Indian tribe in which Perank claimed membership, that Perank was Indian for jurisdictional purposes.[9]

The Utah Supreme Court ultimately affirmed Perank's Indian status, and went on to rule that the

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[9] Its failure to introduce any evidence during the trial on Perank's legal status as a non-Indian and its vigorous assertion on appeal that Perank was an Indian demonstrates that the State's main interest in revoking Perank's probation was in relitigating the Reservation-boundary issue, not in getting an offender off the streets.

Uintah Valley Reservation had been disestablished so as to exclude Myton, Utah, from the Reservation boundaries. Based upon that finding, the court concluded that the State had properly exercised jurisdiction over Perank. See State v. Perank, slip op., supra.

Ute Indian Tribe v. Utah (Revisited)

Upon learning of the Utah Supreme Court's decisions in Perank and Hagen, the Tribe filed a renewed motion for injunctive relief in the Federal District Court for the District of Utah.[10] In its

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[10] During the original Ute Indian Tribe proceeding, the district court had denied the Tribe's motion to enjoin the State and its political subdivisions from interfering with the Tribe's lawful exercise of jurisdiction within the Reservation. However, foreseeing that the State would be dissatisfied with, and might resist, the federal court's decision, the court retained continuing jurisdiction over the action, stating:

> [t]he denial of injunctive relief at this point, however, is a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, the Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary to effectuate its judgment, or as are needed in aid of its jurisdiction.

Ute Indian Tribe v. Utah, 521 F.Supp. at 1157 (emphasis (continued...)

motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final, its decision in State v. Perank.

A hearing on the Tribe's motion was held on August 3, 1992. At that time, the parties stipulated that the State and its political subdivisions would refrain from enforcing the Utah Supreme Court's decision in State v. Perank or from exercising criminal jurisdiction over Indians who are members of any federally recognized Indian tribe or from interfering in any way with the Tribe's lawful exercise of civil and criminal jurisdiction within the boundaries of the Reservation, as those boundaries were confirmed by the Tenth Circuit in Ute Indian Tribe. The stipulation was incorporated into an Order of the Court on September 2, 1992, nunc pro

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[10](...continued)
added). The emphasized comments, which mirror the language of the Anti-Injunction Act, 28 U.S.C. § 2283, suggest that the district court believed that the appropriate authority for compelling the State's compliance with the federal courts' decision on the reservation-boundary issue was that Act. See discussion infra at 15-18.

tunc August 3, 1992.[11]

On the day following the federal court hearing, the Utah Supreme Court issued a Minute Order staying issuance of the remittitur and finality of the judgment of the Court in State v. Perank "pending (1) the conclusion of any proceedings on certiorari to the United States Supreme Court and (2) the final disposition of the injunctive proceedings pending in the United States District Court for the District of Utah." See Minute Entry, State v. Perank, No. 860243 (Utah entered Aug. 4, 1992). A similar order staying effect of the judgment in State v. Hagen was issued on August 18, 1992.[12]

REASONS FOR DENYING THE WRIT

I. It Would Be Premature for this Court to Involve Itself in this Action.

There is an ongoing federal district court proceeding that is now addressing the issues raised in this action. The federal district court has already enjoined enforcement of the Utah Supreme Court's

[11] The Order and Stipulation are attached as Appendix B.

[12] The stays entered in State v. Perank and State v. Hagen are included as Appendix C.

decision in State v. Perank, and has set a briefing schedule and hearing for oral argument on the Tribe's motion for a permanent injunction. The Utah Supreme Court, itself, has stayed the finality of its decisions in State v. Perank and State v. Hagen, pending the outcome of the federal district court action.[13] If this Court were to now grant certiorari,

[13] In petitioning the district court for injunctive relief, the Tribe was particularly concerned with jurisdictional conflicts that could arise should the State or its subdivisions rely on the Perank decision. The Tribe's concerns were alleviated by the district court's preliminary injunction and Utah Supreme Court's stay. Accordingly, there is no immediate jurisdictional conflict or "volatile" situation that this Court must step into to resolve, as suggested by petitioner and respondent. See Pet. at 11-12; State of Utah's Brief in Support of Petition for Writ of Certiorari at 11-12, Hagen v. State, No. 92-6281 (filed Nov. 6, 1992) [hereafter "State's Br. at __"].

Similarly, Hagen's actions - in asserting, in federal court, that he was non-Indian, then asserting in State court that he was Indian - demonstrate that, contrary to the State's claim, the problem of "criminal defendants charged in state court claim[ing] they should be in federal court, and vice versa", State's Br. at 12, pre-existed issuance of the Utah Supreme Court's conflicting decisions on the Reservation-boundary issue. Therefore, it is not a problem that was caused by the issuance of the Perank and Hagen decisions, nor is it a problem that would be resolved by this Court's granting the petition for writ of certiorari.

Nor will the extensive record on the Reservation-boundary issue "go by the wayside", see State's Br. at 13, if the boundary issue is not resolved by this Court on this petition for writ of certiorari. The federal district court proceeding

(continued...)

it would deprive the district court of the specific remedy, afforded by Congress in the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, to protect and effectuate its prior judgment addressing the boundaries of the Reservation. The Court would also deprive the Tribe of its remedy, under the same Act of Congress, to protect the federal court judgment it obtained after 10 years of costly litigation, in which all parties with an interest in the outcome of the litigation were fully and fairly represented.

Moreover, if the Court granted certiorari in this case, it would be sending a strong message that the judgments of lower federal courts, involving federal law issues of such major import and significance as the boundaries of an Indian reservation, are not final and conclusive, and can be relitigated at will in state courts, even in the most minor of criminal cases. The Court's message would require every Indian tribe interested in protecting a federal-court judgment

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[13](...continued)
involves the very same record, and will resolve the primary issue in this action, to wit: whether the State is precluded from relitigating the boundary issue.

construing reservation boundaries to involve itself in literally every criminal proceeding or jurisdictional conflict arising on its reservation and involving not only its own tribal members, but also anyone claiming to be Indian.

A. The Writ of Certiorari Should Be Denied Because the Issues Presented for Review Are Now Pending Before the Federal District Court for the District of Utah.

The pending district court proceeding that is now addressing the issues raised by this action was initiated by the Tribe when it filed a motion in the Federal District Court for the District of Utah pursuant to the "relitigation exception" to the Anti-Injunction Act. In its motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final its judgment, in State v. Perank. See Renewed Motion for Injunctive Relief, Ute Indian Tribe v. Utah, No. C-75-408J (D. Utah filed July 31, 1992).

The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits a federal court from interfering with proceedings in the state courts. See Choo v. Exxon Corporation, 486 U.S. 140, 145 (1988). The Act, which has existed in some form since 1793,

see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a natural corollary to Congress' decision to implement a dual system of federal and state courts. Obviously, this dual system could not function if state and federal courts were free to vie with each other for control over a particular case or issue. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970). By generally barring frequent federal court intervention in state court proceedings, the Act forestalls "needless friction between state and federal courts". Oklahoma Packing Co. v. Gas Co., 309 U.S. 4, 9 (1940).[14]

Congress, however, has permitted injunctions in certain, specific circumstances, namely when an injunction is expressly authorized by statute; where necessary in aid of the federal court's jurisdiction; or where necessary to protect or effectuate the federal court's judgment. Choo v. Exxon Corp., 486 U.S. at

[14] Ironically, in the case now before this Court, it is a decision of the majority of the Utah Supreme Court to ignore principles of comity and federalism and to decline to defer to the Tenth Circuit's resolution of the boundary issue that has created the "needless friction between state and federal courts" that the Anti-Injunction Act was designed to avoid.

146. The third exception - termed the "relitigation exception" - was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." Id.

The relitigation exception is intended to "ensure the effectiveness and supremacy of federal law", 486 U.S. at 146, and is "founded in the well-recognized concepts of res judicata and collateral estoppel". Id. at 147. Thus, in addition to permitting federal courts to effectuate their prior judgments, the relitigation exception is designed "to relieve [the prevailing party in a federal court action] of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980), quoting Montana v. United States, 440 U.S. 147, 153-54 (1979).

This Court has recognized that the federal district courts are best suited to determine whether state or federal law bars a party from raising, in a subsequent state court proceeding, an issue that previously has been presented to and decided by the

federal courts. See Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525-26 (1986). This Court has also concluded that the federal district courts are in the best position to determine whether, under the relitigation exception to the Anti-Injunction Act and general principles of equity, comity and federalism, state courts should be enjoined from deciding an issue that previously was raised and decided by the federal courts. Id. at 526.

Given this Court's recognition of the competence and ability of the district courts, and the Tribe's current motion now pending before the Federal District Court for the District of Utah, this Court should deny the writ of certiorari and permit the district court to resolve the paramount issues presented by this unusual case.

B. The Writ of Certiorari Should Be Denied Because the Doctrine of Collateral Estoppel Precludes the State from Relitigating the Reservation-Boundary Issue.

As indicated in the Tribe's "Question Presented", the threshold issue in this case is whether the State is collaterally estopped from relitigating the Reservation boundaries. This issue should be resolved by the pending federal district

court proceeding and this Court should deny review in order to allow the district court to make that determination. In addition, collateral estoppel presents another reason why this Court should deny the State another forum in which to relitigate the Reservation-boundary issue.

Under the doctrine of collateral estoppel, once an issue has been actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. at 153. The State now asks this Court to review the identical issue that it declined to review in Ute Indian Tribe based, not upon any change in the law, see discussion infra at 28-33, but upon the State's unrelenting claim that the Tenth Circuit was wrong. The State's actions have resulted in repetitious, vexatious and wasteful litigation that the doctrine of collateral estoppel is framed to avoid. As set forth below, each of the criteria for application of the doctrine, see, e.g., Montana, supra; Coffey v. Dean Witter Reynolds, Inc., 961 F.2d 922, 925 (10th Cir. 1992), is fully satisfied in this case.

1. The Reservation-boundary issue advanced by the State is identical to the Reservation-boundary issue decided against the State in Ute Indian Tribe.

The issue litigated by the Tribe, State, counties, cities and United States in Ute Indian Tribe is identical to the issue raised by the petitioner and respondent here. The question common to both actions was whether Congress intended to disestablish the Reservation. The facts relevant to resolving the issue are identical, and concern construction of various Congressional enactments at the turn of the century.[15] Moreover, the legal arguments raised by the State in its brief in support of the petition are virtually identical to those raised when it sought a writ of certiorari in Ute Indian Tribe.

It is of no legal significance that the Reservation-boundary issue was litigated in a civil context in Ute Indian Tribe and in a criminal context

[15] The principle Acts at issue in both Ute Indian Tribe v. Utah and State v. Perank were the Indian Appropriations Act of 1902, Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Indian Appropriations Act of 1905, Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. See State v. Perank, slip op. at 19, 25.

in State v. Hagen. Resolution of the issue turns on identical facts, i.e., construction of the 1902 and 1905 Indian Appropriations Acts. See Ute Indian Tribe v. Utah, 773 F.2d at 1089. Collateral estoppel bars a government from relitigating, in a subsequent criminal action, an issue that was actually and necessarily decided against it in a prior civil proceeding. Yates v. United States, 354 U.S. 298, 335 (1957) (overruled on other grounds); United States v. Rogers, 960 F.2d 1508 (10th Cir. 1992). Cf. Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.") (emphasis added).

2. The judgment in Ute Indian Tribe was final.

This Court's denial of certiorari in Ute Indian Tribe did not, as the State suggests, render the Tenth Circuit's decision less than dispositive on the Reservation boundary issue.[16] To the contrary, a denial of certiorari establishes the finality of the

[16] Under the State's rationale, the finality of every case for which this Court denies a writ of certiorari is brought into question. See discussion infra at 27-29.

decision from which appeal was sought. See Dairy Distributors, Inc., v. Western Conference of Teamsters, 294 F.2d 348, 352 (10th Cir. 1961).[17]

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[17] When it asserts that the Tenth Circuit misapplied this Court's "fairly clean analytical structure", see State's Br. at 14, the State grossly distorts the en banc and district courts' findings that the Uintah Valley Reservation was not disestablished. Ever since the Ute Indian Tribe litigation was initiated, the State has maintained that the Act of May 27, 1902, 32 Stat. 245, effected the opening of the Reservation. The 1902 Act contains language restoring the to-be-opened lands to the public domain. However, the 1902 Act was not the controlling legislation leading to the district court's and Tenth Circuit's decisions in Ute Indian Tribe.

The Tenth Circuit has acknowledged that, had it determined that the 1902 Act opened the Reservation, it, too, would have found that Congress intended to disestablish the Reservation. See Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1287, 1400 (10th Cir. 1990), cert. denied, _ U.S.__, 111 S.Ct. 581 (1990). However, the Tenth Circuit rejected the State's argument that the 1902 Act opened the Reservation, determining, on the basis of the voluminous evidence and briefs before it, that the Act of March 3, 1905, 33 Stat. 1048, effected the opening of the Reservation. In part because the 1905 Act contained no language restoring the opened lands to the public domain, the Tenth Circuit concluded, as had the district court, that Congress did not intend to disestablish the Reservation.

While the State would have this Court believe that the Tenth Circuit misapplied Supreme Court precedent, see State's Br. at 14-26, when stripped of its veneer, the State's argument is basically a complaint that the Tenth Circuit rejected the State's argument that the 1902 Act opened the Reservation. That same complaint formed the basis of the petition for writ of certiorari that the State filed, and this Court denied, in Ute Indian Tribe. No "new" reason exists to once again allow the (continued...)

In announcing its en banc decision, the Tenth Circuit expressly held:

> The . . . Act [of May 27 1902, 32 Stat. 245] would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands . . . . Finally Congress passed the . . . Act [of March 3, 1905, 33 Stat. 1048], opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.
>
> It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," . . . that carried through into the 1905 Act.
>
> * * *
>
> The . . . conclusion [of the Tenth Circuit panel] that the Uintah Reservation was diminished by the 1905 Act is not correct. Indeed, we

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[17](...continued)
State to advance an argument - that the 1902 Act opened the Reservation - that has failed on at least three previous occasions in the federal courts.

> accept the district's court view that the Reservation's boundaries were not changed by the 1905 Act.

Ute Indian Tribe v. Utah, 773 F.2d at 1089.

This unequivocal statement is a final ruling on the merits of the issue of disestablishment of the Reservation. The State of Utah is bound by that decision and is precluded from raising and seeking to relitigate the issue in this or any other court.

3. The State was a party to the Ute Indian Tribe litigation.

When the Tribe initiated the Ute Indian Tribe litigation in 1975, the named defendants were Duchesne County and the Cities of Roosevelt and Duchesne. The State voluntarily intervened as a party-defendant in 1976.[18] See Ute Indian Tribe v. Utah, 521 F.Supp. at 1078. Merely because the federal courts rendered a decision contrary to the position advanced by the State does not absolve the State from being bound by the federal court's decision. Cf. Montana v. United States, 440 U.S. at 163 (precluding the federal government from relitigating an issue of federal law in federal court

[18] Uintah County was joined as a defendant in 1979.

after the government had submitted to adjudication of its federal claims in a state forum and the state court had ruled adversely to the government); England v. State Board of Medical Examiners, 375 U.S. 411, 419 (1964) (same).[19] Considerations of comity, as well as repose, militate against permitting relitigation of a federal issue in a state forum at the behest of a party who chose to litigate that issue in federal court in the first instance.

4. The State had a full and fair opportunity to, and did, vigorously litigate the Reservation-boundary issue in Ute Indian Tribe.

The State has not alleged any procedural impropriety, such as would justify relitigation of the Reservation-boundary issue, in the federal courts' handling of Ute Indian Tribe. Cf. Montana v. United States, 440 U.S. at 164 n.11 (ruling that collateral estoppel is not applicable where there is reason to

[19] Had the State wanted to participate in the Ute Indian Tribe litigation, but not be bound by the decision of the federal courts on the Reservation-boundary issue, it could have intervened as an amicus curiae. See Kerr-McGee Chemical Corporation v. Hartigan, 816 F.2d 1177 (7th Cir. 1987) (holding that the State of Illinois was not bound by the decision of a federal court issued in a prior action in which the State participated as an amicus curiae).

doubt the "quality, extensiveness, or fairness of procedures followed in prior litigation"). Rather, the only "impropriety" alleged by the State is the Tenth Circuit's failure, sitting en banc, to rule that the Reservation had been disestablished. See State's Br. at 16-24.

In reaching its decision on the Reservation-boundary issue, the district court conducted a two-day trial; took testimony from 18 witnesses; and admitted more than 800 documentary exhibits.

> Besides giving careful scrutiny to these documents and the record at trial, t[he district] court [] studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as amicus, and [] examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other learned treatises and historical works that [were] relevant to this Court's determinations.

521 F.Supp. at 1080.

The trial record was certified to the Tenth Circuit. Each party and the United States, as amicus, submitted extensive briefs to the Tenth Circuit in support of their respective positions, both when the initial panel considered the case, and again

when it was heard by the court en banc.[20] The State and political subdivi-sions petitioned this Court for review of the Tenth Circuit's final decision.[21]

Obviously, the State vigorously litigated the Reservation-boundary issue, all the way to the highest court in the land. This Court should again reject the State's efforts to relitigate the boundary issue. To do otherwise will bring into question the finality of every decision this Court has been asked, but has declined, to review; would subject the prevailing party in every federal court action to the cost and vexation of defending itself, on the same issue, in multiple lawsuits; would encourage forum shopping by the losing party in federal court litigation, in the hope of finding a state court willing

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[20] The en banc panel noted that "[t]he district court's opinion was indeed well researched on [the question of disestablishment], and other [issues] as well." Ute Indian Tribe v. Utah, 773 F.2d at 1089.

[21] The United States filed a brief in opposition to this Court granting certiorari. In that brief, the United States characterized as "exhaustive" the federal courts' consideration of the Reservation-boundary issue, see Brief of United States at 14-15, Utah v. Ute Indian Tribe, No. 85-1821 (filed Nov. 1986), indicating that the federal government fully supports the en banc decision of the Tenth Circuit that the Uintah Valley Reservation had not been disestablished.

to enter a decision that conflicts with a prior decision of a federal court; and would deprive all federal court decisions of finality, except for those decisions issued by this Court. Such results would wreck havoc on the dual system of courts contemplated by our founding fathers and instituted by the First Congress.

II. Principles of Comity and Finality Require that the Court Deny the Petition for Writ of Certiorari.

This action is now before this Court as a result of the State's "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue" of federal law. See State v. Perank, slip op. at 42 (Zimmerman, J., dissenting). In proceedings that involved "unequal and inadequate briefing",[22] id., and in which all parties with an interest in the outcome of the litigation were not fully and fairly represented, id. at 43, the State achieved "what it

[22] Justice Zimmerman's dissent contradicts the State's suggestion, see State's Br. at 13, that the Utah Supreme Court considered the Ute Indian Tribe record, which had been certified to that court, when it decided State v. Perank. See slip op. at 42-43 (indicating that the only materials considered by the court were the briefs submitted by the parties and amicus curiae).

has desperately sought for six years - a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling [in Ute Indian Tribe v. Utah, 773 F.2d 1087] and to give Utah control over a large part of the original reservation." Slip op. at 42 (Zimmerman, J., dissenting). This Court should not countenance the State's machinations, which "come[] at an unacceptably high cost to the relationship between the state and federal judiciaries." Id. Instead, the Court should uphold what has been the settled law in Utah for more than seven years, and deny the writ of certiorari.[23]

[23] The State's unabashed efforts (undertaken in proceedings to which neither the Tribe nor the United States was a party) to relitigate, in its own courts, the federal Indian law issues resolved by the en banc decision of the Tenth Circuit is reminiscent of the persistent and occasionally malicious efforts by the State of Washington more than a decade ago to strip its Indian citizens of their rights secured by treaties and statutes.

That State's "extraordinary machinations" to resist federal law, now being repeated in Utah, prompted this Court to comment:

> [e]xcept for some desegregation cases . . ., the district court has faced the most concerted official and private efforts to frustrate a decree of the federal court witnessed in this century. The challenged orders and this appeal must be reviewed by this court in the context of events

(continued...)

A. This Court's Actions in Solem and DeCoteau Do Not Require that the Court Grant the Petition for Writ of Certiorari in This Proceeding.

In the proceedings below, the State argued that the Utah courts were free to ignore the 1985 en banc decision of the Tenth Circuit in Ute Indian Tribe.[24] The State now urges that same argument

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[23](...continued)
forced by litigants who offer the court no reasonable choice.

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 696 n.36 (1979).

In reviewing the State's attempts to obtain this Court's review of the Reservation-boundary issue, this Court should consider the context created, and forced upon the Court and Tribe, by the State.

[24] The State's argument is based, in part, upon the State's perception that the Tenth Circuit failed to show proper deference to three previous decisions of the Utah Supreme Court, which, the State asserts, decided the disestablishment issue. State's Br. at 9, 11 & n.9. However, in none of the cases relied on by the State had the Reservation-boundary issue been fully raised and considered by the state courts.

Brough v. Appawora, 533 P.2d 934 (Utah 1976), vacated and remanded, 431 U.S. 901 (1977), involved a personal injury action in which the defendant, an enrolled member of the Tribe, claimed to be subject to tribal, rather than State, jurisdiction because the tort had been committed on the Reservation. In deciding the case, the Utah Supreme Court did not consider the relevant Acts of Congress to determine whether they displayed a Congressional intent to disestablish

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[24](...continued)
the Reservation. Rather, in what may well be the most outrageous reported decision (mis)applying this Court's Indian law decisions, the Utah Supreme Court found that the Reservation had been disestablished because, the Court (wrongly) determined, the Tribe had ceased to exist.

> The Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States. When a nation ceases to exist, its treaties are no longer of any force or effect, and the descendants of those who constituted the erstwhile nation cannot thereafter claim any benefits under the treaty.

553 P.2d at 935.

Showing complete contempt for this Court's precedents, e.g., Ex parte Crow Dog, 109 U.S. 556 (1883) (confirming tribal jurisdiction over offenses committed by Indians on a reservation), and for Acts of Congress, see 25 U.S.C. §§ 1321, 1322, as amended (requiring tribal consent to a State's assumption of jurisdiction on a reservation), the Utah Supreme Court upheld the trial court's determination that an Indian was subject to state court jurisdiction for a tort committed on the Reservation, under the rationale that:

> [t]o permit an Indian who commits a [tort or crime on the Reservation] to show disdain for the [State] prosecuting officials and claim the sanctuary of the tribal method of procedure is unthinkable.

553 P.2d at 936. After Brough was remanded to the state court for reconsideration in light of this Court's decision in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the defendant had it removed to federal court pursuant to 28 U.S.C. § 1441. The federal district court later enjoined concurrent state proceedings, in order to aid the federal court's

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on this Court. The State's position ignores all principles of comity and finality.

As support for its position that the Utah courts could blatantly ignore the Tenth Circuit's en banc decision in Ute Indian Tribe, the State has repeatedly relied upon this Court's having granted a writ of certiorari to review conflicting decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the State of South Dakota with respect to the boundaries of the Cheyenne River and Lake Traverse Indian Reservations. However, in its argument, the State completely ignores the chronology of the series cases that led this Court to grant review in Solem v. Bartlett, 465

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[24](...continued)
removal jurisdiction. See 28 U.S.C. § 2283.

In Perank, the Utah Supreme Court distinguished Sowards v. Meagher, 37 Utah 212, 108 P. 1112 (1910), admitting that, "it cannot be said, as a technical matter, that the Sowards opinion specifically addressed the question of whether the Reservation was disestablished." See State v. Perank, slip op. at 38. The dissenting Justice maintains that "the same observation holds true for White Rocks Irrigation Co. [v. Mooseman, 45 Utah 79, 141 P. 459 (1914)]". See slip op. at 44 (Zimmerman, J., dissenting). Thus, "the [State's] implication . . . that [the Utah Supreme Court] has previously ruled on the issue [of Reservation disestablishment and that the federal courts had not granted the state court's ruling proper deference] is simply incorrect." Id.

U.S. 473 (1984) and in DeCoteau v. District County Court, 420 U.S. 425 (1975), and, in contrast to the Utah Supreme Court, the lengths to which the South Dakota Supreme Court went to justify why it departed from prior and conflicting decisions of the federal court on a reservation-boundary issue.

In the series of cases leading to this Court's decision in DeCoteau, the South Dakota Supreme Court issued its decision on the uniquely federal question of the boundaries of the Lake Traverse Reservation before the Eighth Circuit issued its conflicting decision. See DeCoteau v. District County Court, 211 N.W.2d 843 (S.D. 1973), aff'd, 420 U.S. 425 (1975); United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), rev'd sub nom DeCoteau v. District County Court, 420 U.S. 425 (1975). Thus, unlike the Utah Supreme Court, the South Dakota Supreme Court did not decide on an issue of uniquely federal law in complete disregard for a previous decision of the federal courts on the same issue.

Similarly, in the series of cases leading to this Court's review of Solem, the South Dakota Supreme Court did not presume, as did the Utah Supreme

Court, to issue a decision contrary to a previous federal court decision on reservation boundaries without legitimate, legal reasons for doing so. Rather, each time that the South Dakota Supreme Court issued a decision finding that the Cheyenne River Reservation had been disestablished, this Court had issued an intervening opinion that reasonably called into question the prior and conflicting decisions of the Eighth Circuit on the reservation-boundary issue. Only on the basis of the intervening decisions of this Court did the South Dakota Supreme Court venture to decide the reservation-boundary issue in conflict with a prior decision of the Eighth Circuit. See Stankey v. Waddell, 256 N.W.2d 117, 119 (S.D. 1977) (finding that this Court's intervening decision in DeCoteau called into question the analysis applied and result reached by the Eighth Circuit in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973)); State v. Janis, 317 N.W.2d 133, 137 (S.D. 1982) (relying on Stern & Gressman, Supreme Court Practice, § 5.12 at 362 (5th ed.), to find that this Court's summary disposition of United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980

(1980), reasonably indicated that a majority of Justices found the Eighth Circuit's decision to be "so clearly erroneous as to make oral argument a waste of time," and therefore, not binding on the State court).

This Court has not issued any disestablishment decisions, much less one that casts doubt upon the Tenth Circuit's decision, since the Tenth Circuit decided, and this Court denied the State's petition for writ of certiorari in, Ute Indian Tribe.[25] Consequently, the Utah Supreme Court's

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[25] The State suggests that the Tenth Circuit has criticized its decision in Ute Indian Tribe. See State's Br. at 21-24. Again, the State misreads a decision of the Tenth Circuit.

In Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, the Tenth Circuit distinguished the court's dicta (quoted at State's Br. at 16) regarding restoration language in Ute Indian Tribe, saying:

> we view the comments about restoration language as extraneous because restoration language was not the operative language of the statutes being construed [in Ute Indian Tribe], unlike the situation now before us.

909 F.2d 1400 (emphasis added). Thus, rather than criticizing Ute Indian Tribe, as suggested by the State, Yazzie reiterates the Tenth Circuit's decision that the 1905, rather than the 1902, Indian Appropriations Act opened the Reservation, and that the 1905 Act failed to evidence the requisite

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conduct in issuing a decision that directly conflicts with the federal courts' resolution of the Reservation-boundary issue can only be attributed to a complete disregard for the principles of comity that this Court has proclaimed apply in the Indian-law context. E.g., Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 895 (1985). This Court should deny the petition for writ of certiorari, thereby rejecting the State's, and a majority of the Utah Supreme Court's, blatant disregard for principles that are fundamental to the integrity of this society's judicial system.

B. Granting the Petition for Writ of Certiorari in this Case Would Conflict with Judicial Principles of Comity and Finality.

As the chronology set forth above reflects, in issuing its decisions on reservation disestablishment, the South Dakota Supreme Court was always conscious that principles of comity required deference to a federal court decision on the uniquely

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[25](...continued)
Congressional intent to disestablish the Uintah Valley Reservation. See 909 F.2d 1399-1400.

federal law issue of reservation disestablishment. Only when an intervening decision of this Court reasonably called into question a prior federal court decision on the disestablishment issue, did the South Dakota Supreme Court hazard to upset the federal courts' decision on the federal law issue.

By contrast, at the urging of the State, a majority of the Utah Supreme Court displayed no similar deference to principles of comity. See State v. Perank, slip op. at 43 (Zimmerman, J., dissenting). Instead, without this Court having issued any intervening "disestablishment" decisions, and in full recognition that a majority of the entire Tenth Circuit had applied prior "disestablishment" precedent of this Court in reaching its decision in Ute Indian Tribe, the Utah Supreme Court decided an issue contrary to, and in complete disregard for, the Tenth Circuit's earlier decision on the identical, and uniquely federal, issue of reservation disestablishment.[26]

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[26] In addition to chronology, there is a significant fact that distinguishes the Solem and DeCoteau series of cases from the instant proceedings. In none of the cases leading up to Solem or DeCoteau had the State of South Dakota voluntarily (continued...)

In asking the Utah Supreme Court to ignore the previous decision of the Tenth Circuit resolving the boundary issue, the State did not argue that the Tenth Circuit's decision contravened the laws or policies of the State, see State v. Perank, slip op. at 44 (Zimmerman, J., dissenting), which is an acceptable basis for not deferring to another court's resolution of an issue. Id. Rather, the State asked the court to revisit the boundary issue "for the sole purpose of creating a conflict with the federal courts to force Supreme Court review." Id. at 45. A majority of the Utah Supreme Court's acquiescence to the State's request "needlessly upsets a

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[26](...continued)
intervened in a federal court action, filed by the affected tribe, in which the sole issue litigated was whether reservation boundaries had been disestablished, and, being dissatisfied with the decision of the federal court, attempted to relitigate the reservation-boundary issue in state court.

By contrast, in the instant proceedings, the State of Utah voluntarily submitted to the jurisdiction of the federal courts when it intervened in the Ute Indian Tribe litigation, and therefore consented to being bound by the federal courts' decision on the issue of disestablishment of the Uintah Valley and Uncompahgre Reservations. Virtually immediately after the federal court decided the issue against it, the State initiated proceedings to upset the federal courts' decision in its own courts, without the participation of its principle adversary, the Tribe, and in complete disregard for principles of comity and federalism.

previously settled area of law and . . . encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context." Ibid. If this Court were to acquiesce to the State's request that it review the Utah Supreme Court's decision on the Reservation-boundary issue, the Court could find itself inundated with reservation-boundary cases, a result that the State appears to desire. See State's Br. at 13-24 (suggesting this Court must determine, in each instance, whether the particular act(s) opening a certain reservation did or did not disestablish the reservation).[27]

This Court should uphold the doctrine of comity and discourage parties from relitigating previously settled issues, in the hope of obtaining

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[27] Between 1960 and 1990, there were at least 27 reported state and lower federal court decisions involving reservation boundaries. This Court granted the writ of certiorari to review five of those decisions. See Solem v. Bartlett, 465 U.S. 473 (1986); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 45 (1962). Under the State's theory, the Court would have had to accept every one of the 27 cases before there would be any certainty as to the boundaries of the affected reservations.

inconsistent decisions and "forcing" review by this Court, by denying the writ of certiorari in this action.[28]

III. This Court Should Deny the Petition for Writ of Certiorari Because the State Possesses, and Has Always Possessed, Criminal Jurisdiction Over Hagen Based on His [Non-]Indian Status

The Reservation boundaries are irrelevant to the criminal jurisdiction issue in this case. The State has always possessed criminal jurisdiction over Robert Hagen because he is a non-Indian for legal purposes.[29] With limited exceptions not relevant to these proceedings, state courts have jurisdiction to prosecute a non-Indian for an offense committed in Indian country where the victim is not Indian. See New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1882).

The term "Indian" has been defined since 1934 as consisting of:

> all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[30]

25 U.S.C. § 479 (emphasis added). Those groups that are not "recognized" by the United States, pursuant to this definition, are not Indian tribes and their members, accordingly, are not "Indian".[31]

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[28] To its credit, the Utah Supreme Court seems to have retreated from its defiance of comity principles. On August 4, 1992, the court stayed the finality of its decision in State v. Perank, pending the federal district court's determination on the Tribe's renewed motion for injunctive relief, which is based on the relitigation exception of the Anti-Injunction Act. By staying its decision, pending the outcome of the federal court proceedings, the Utah Supreme Court has indicated a willingness to defer to the federal courts on the issue of whether, by its voluntary participation in the Ute Indian Tribe litigation, the State is precluded from relitigating the Reservation-boundary issue in state court.

Thus, rather than having "ominous" consequences, as suggested by the State, see State's Br.at 12, the Tribe's having availed itself of an equitable remedy afforded by Congress may have assisted in averting a clash between the federal and state courts in Utah.

[29] The Tribe does not dispute that Robert Hagen may be Indian for ethnological purposes.

[30] The Utah Court of Appeals found that Robert Hagen possesses 5/16ths degree of Indian blood. See State v. Hagen, 802 P.2d at 747.

[31] See Morton v. Mancari, 417 U.S. 535, 553 n. 24 (1974) (recognizing federal criminal jurisdiction does not extend to (continued...)

The federal government considers an "Indian" to be only those persons who are, or who are descended from, members of Indian tribal entities that are "recognized" by the United States. See 25 U.S.C. § 450b(b) and (c) (defining Indian as a person who is a member of an Indian tribe, and Indian tribe as any tribe, band, nation or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians).[32] As an example, the Bureau of Indian

[31](...continued)
many persons who can be racially classified as "Indian"); United States v. Heath, 509 F.2d 16 (9th Cir. 1974) (finding a member of the terminated Klamath Indian Nation not "Indian" for purposes of federal criminal jurisdiction); St. Cloud v. United States, 702 F.Supp. 1456, 1466 (D.S.D. 1988) (holding that a member of the terminated Ponca tribe is not subject to federal jurisdiction under the Major Crimes Act, 18 U.S.C. §§ 1153, 3242). See also State v. Gardner, 827 P.2d 980 (Utah App. 1992) (finding a terminated Ute, see 25 U.S.C. § 677a, to be subject to state jurisdiction for an offense committed on the Uintah and Ouray Reservation).

[32] The "recognition" requirement, first established in the Indian Reorganization Act and carried through in the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, also applies in numerous other Indian programs. E.g., Indian Health Care Act, 25 U.S.C. §§ 1601-1680; Indian Financing Act, 25 U.S.C. §§ 1451-1543; Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923.

Affairs' Courts of Indian Offenses, which serve as Indian courts on 22 reservations, follow this rule by restricting their scope of criminal jurisdiction to "any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction . . .". 25 C.F.R. § 11.2(c) (1991) (emphasis added).

In order to clarify which Indian entities are "recognized" by the United States, the United States Department of the Interior has published a list of Indian groups recognized as having a special relationship with the United States. See 51 Fed. Reg. 25,115 (1986). The only persons eligible for services administered by the Bureau of Indian Affairs, and thus the only persons whom the BIA considers to be "Indian", are those individuals who are members of the identified Indian tribes.

Robert Hagen has not been adjudicated an "Indian" for purposes of federal or state criminal jurisdiction, and indeed could not and cannot be.[33] The trial court, in fact, found that the State

[33] As noted, originally the United States attempted to criminally prosecute Hagen. This prosecution was dismissed, however, when the authorities discovered that Hagen was a member of a "non-recognized" Indian tribe, thereby making him a non-Indian for purposes of federal criminal jurisdiction.

possessed jurisdiction over Hagen, regardless of the situs of the offense, because he was not an Indian. See T. 25, lines 12-13.[34]

All parties to the proceedings acknowledge that Hagen's only Indian affiliation is as a member of the Little Shell Band of Chippewa Indians. The Little Shell Band of Chippewa Indians is not a federally recognized Indian tribe. See 51 Fed. Reg. 25,115 (1986). Accordingly, neither Hagen nor the Little Shell Band are eligible for services from the Bureau of Indian Affairs nor are they recognized as satisfying the requirements for being "Indian" for purposes of federal civil or criminal statutes. See 25 U.S.C. §§ 450b, 479, 1452(b), 1603 and 1903(3) and (8). As a consequence, there never has been, and is not now, any question that the State had criminal jurisdiction to prosecute Hagen for proscribed

[34] While the Utah Court of Appeals reversed the trial court's determination on the grounds that it had improperly allocated the burden of proof and applied an improper standard of proof, the court declined to expressly find Robert Hagen to be an Indian. See State v. Hagen, 802 P.2d 745. Moreover, although the State argued that "the central issue in this case is whether [Robert Hagen] is an Indian", see Reply Brief of Appellee at 2, State v. Hagen, No. 910017 (Utah filed Dec. 27 1991), the Utah Supreme Court failed to decide the issue.

conduct occurring within the boundaries of the Reservation. United States v. McBratney, 104 U.S. 621; United States v. Rogers, 45 U.S. 567 (1845). Therefore, the issue of the continued existence of the Reservation is not germane to Hagen's conviction and is not a question that should be decided by this Court on a writ of certiorari.[35]

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari, and permit the Federal District Court for the District of Utah to resolve the issues presented in this action.

[35] It is the Tribe's position that Robert Hagen is not an Indian for jurisdictional purposes, and that the Court should decline to review a case that jeopardizes the Tribe's governmental authority when that review is not necessary or called for. However, if the Court were to grant the writ of certiorari, it should summarily vacate the decision of the Utah Supreme Court, for the reason that a member of a tribe that is not "federally recognized" is not an "Indian" for purposes of criminal jurisdiction. Alternatively, the case should be remanded for a determination by the trial court, applying the proper standard and allocation of proof, on the claimed "Indian" status of Robert Hagen.

Respectfully submitted,

Robert S. Thompson, III
Counsel of Record
Sandra Hansen
Jeanne S. Whiteing
Tod J. Smith
WHITEING & THOMPSON
1135 Pearl Street, Suite 203
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(303) 444-2549

Counsel for Amicus Curiae
Ute Indian Tribe

APPENDICES

APPENDIX A

OFFICE OF THE ATTORNEY GENERAL
STATE OF UTAH
PAUL VAN DAM
ATTORNEY GENERAL

November 10, 1992

Ms. Sandra Hansen
WHITEING & THOMPSON
Attorneys at Law
1136 Pearl Street, Suite 203
BOULDER< CO 80302

Re: Hagen v. Utah,
United States Supreme Court No. 92-6281

Dear Sandy:

Enclosed herewith is the consent letter you requested in the above-entitled action.

Best regards.

Very truly yours,

/s/ MICHAEL M. QUEALY
Assistant Attorney General

Enclosure
MMQ/jr

OFFICE OF THE ATTORNEY GENERAL
STATE OF UTAH
PAUL VAN DAM
ATTORNEY GENERAL

November 10, 1992

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
1 First Street, N.E.
WASHINGTON, DC 20543

Re: Hagen v. State of Utah, U.S. Supreme Court No. 92-6281, On Petition for Writ of Certiorari

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 37.2, this letter will serve as written consent of Respondent State of Utah to the filing of a brief amicus curiae by the Ute Indian Tribe in the above-referenced action throughout these proceedings, including the period prior to this Court's consideration of the Petition for Writ of Certiorari.

Respectfully yours,

/s/ MICHAEL M. QUEALY
(Counsel of Record)
Assistant Utah Attorney General

MMQ/jr

Joel D. Berrett
Attorney at Law
58 East 100 North
P.O. Box 262
Roosevelt, Utah 84066

November 3, 1992

Sandy Hansen
1136 Pearl Street, Suite 203
Boulder, Colorado 80302

RE: Hagen v. Utah

Dear Sandy:

Enclosed herewith please find the consent letter which I have signed allowing you to file Amicus Curiae Briefs in the above matter. If you have any questions, please contact me.

Yours very truly,

/s/ Joel D. Berrett
Joel D. Berrett
Attorney at Law

Enclosure

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First, N.E.
Washington, D.C. 20543

Re: State v. Hagen, No. 92-6281, On Petition for Writ of Certiorari to the Supreme Court of Utah

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 36.1, this letter serves as petitioner Robert P. Hagen's written consent to the Ute Indian Tribe filing a brief amicus curiae in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of certiorari.

Sincerely,

/s/ Joel Berrett
Joel D. Berrett
Counsel of Record for Petitioner
Post Office Box 262
Roosevelt, Utah 84066
(801) 722-3606

APPENDIX B

THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah Plaintiff, vs. STATE OF UTAH, Defendant in Intervention, and DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation, Defendants. UNITED STATES OF AMERICA and PARADOX PRODUCTION CORPORATION, a Utah Corporation, Amicus Curiae.	)	Civil No. C 75-408 ORDER

This matter came before the Court on the Motion of the Ute Indian Tribe for a Temporary Restraining Order or Preliminary Injunction. All parties to the proceeding received copies of the Tribe's pleadings in advance of a hearing held on Monday, August 3, 1992 at 3:30 p.m. and were represented by legal counsel at the hearing.

At the Court's request, attorneys for the Tribe had spoken with the State Attorney General's office prior to the hearing for the purpose of determining whether the parties could reach an agreement on the issue presented to this Court by the Tribe's motion for a preliminary injunction. A stipulation was reached, whereby the State agreed, on behalf of itself and its political subdivisions, to refrain from enforcing the Utah Supreme Court's decision in State v. Perank, No. 860243 (Utah July 17, 1992); from exercising civil or criminal jurisdiction in a manner that conflicts with federal law within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986); or from interfering, in any

way, with the Tribe's exercise of criminal, civil and regulatory jurisdiction, consistent with federal and tribal law, within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe, supra.

Counsel for the State and for the Tribe stated, for the record, their respective understandings of the agreement, which had not yet then been memorialized. No objection to the agreement was lodged by counsel for the political subdivisions or amicus curiae United States.

The Court hereby incorporates by reference the attached stipulation between the State of Utah, County of Duchesne, County of Uintah, City of Roosevelt, City of Duchesne and Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and hereby ORDERS that the parties shall comply with the provisions of said stipulation until this Court issues its decision on the merits of the Tribe's Renewed Motion for Injunctive Relief or until such other date as is fixed by agreement between the parties or by order of this Court.

Dated this 2nd day of September, 1992, nunc pro tunc August 3, 1992.

/s/
Bruce S. Jenkins, Chief Judge
United States District Court
District of Utah

STIPULATION

This stipulation is made this 31st day of August, 1992, by and between the State of Utah [hereafter, "the State"], the County of Duchesne, the County of Uinta, the City of Roosevelt, the City of Duchesne [hereafter collectively referred to as "the local defendants"] and the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah [hereafter, "the Tribe"], through the parties' legal counsel.

The Utah Supreme Court's decision in State v. Perank, No. 860243 (July 17, 1992) conflicts with the decision of the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d (10th Cir. 1985) (en banc), cert. denied, U.S. (1986) insofar as each decision purports to set forth the boundaries of the Uintah Valley Reservation (now a part of the Uintah and Ouray Reservation). In order to avoid potential chaos and avoid jurisdictional uncertainty in the Uintah Basin, the State, local defendants and Tribe enter into the following stipulation.

1. The State, local defendants, their officers, agents, employees and any person acting in their behalf shall refrain from enforcing the Utah

Supreme Court's decision in State v. Perank, No. 8602433 (Utah July 17, 1992), and shall refrain from exercising criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe or civil jurisdiction over actions involving the Ute Indian Tribe or members of the Ute Indian Tribe, or interfering, in any way, with the Tribe's exercise of such civil or criminal jurisdiction within the exterior boundaries of the Uintah and Ouray Reservation, Utah, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 10 (10th Cir. 1985) (en banc), cert. denied, U.S. (1986).

2. The Tribe shall exercise criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe and shall exercise civil and regulatory jurisdiction over Indians and non-Indians to the extent permitted by federal and tribal law within the exterior boundaries of the Uintah and Ouray Reservation, Utah, as those boundaries were set forth by the Tenth Circuit Court of Appeals in Ute Indian Tribe v. Utah, 773 F.2d 10 (10th Cir. 1985)

(en banc), cert. denied, U.S. (1986).

3. This stipulation shall expire on the date immediately following the date on which the Federal District Court for the District of Utah issues its decision on the Tribe's Renewed Motion for Injunctive Relief in Civil No. C-75-408 unless further extended in writing by the parties or by order of the Federal District Court for the District of Utah.

4. Nothing contained herein shall prejudice or be deemed a waiver of the claims or defenses of any party to this stipulation.

/s/ Paul Van Dam Attorney General State of Utah	/s/ Robert S. Thompson, III General Counsel Ute Indian Tribe
/s/ Harry Souvall, Attorney Uinta County, Utah	/s/ Herbert Gillespie, Attorney Duchesne County, Utah
/s/ Craig Bunnell, Attorney City of Roosevelt	/s/ Paul Uresk, Attorney City of Duchsene

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

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Regular May Term, 1992 August 4, 1992

State of Utah,
Plaintiff and Appellee,

No. 860243

v.

Clinton Perank,
Defendant and Appellant

MINUTE ENTRY

The Court being fully advised in the premises grants the motion of the State and orders that the issuance of the remittitur be stayed and that the finality of the judgment of the Court also be stayed pending (1) the conclusion of any proceedings on certiorari to the United States Supreme Court and (2) the final disposition of the injunctive proceeding pending in the United States District Court for the District of Utah.

By the Court

Joel D. Berrett
Attorney for Defendant
P.O. Box 262
Roosevelt, Utah 84066
(801) 722-3606

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Appellee,	:	ORDER TO STAY REMITTITUR
vs.	:	
ROBERT P. HAGEN, Defendant-Appellant.	:	

Based upon the motion of the defendant and good cause, the remittitur is stayed for 90 days pending defendant's decision whether to file a petition for a writ of certiorari in the United States Supreme Court.

DATED this 18th day of Aug., 1992.

FOR THE COURT:

/s/ Gordon R. Hall